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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Question of the impunity of perpetrators of human rights violations (civil and political)

Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119

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INTRODUCTION

A. Origins of the campaign against impunity

1. At its forty-third session (August 1991), the Sub-Commission requested the author of this report to undertake a study on the impunity of perpetrators of human rights violations. Over the years, that study has revealed that the process by which the international community has become aware of the imperative need to combat impunity has passed through four stages.

First stage

2. During the 1970s, non-governmental organizations, human rights advocates and legal experts and, in some countries, the democratic opposition - when able to state its views - mobilized to argue for an amnesty for political prisoners. This was typical in Latin American countries then under dictatorial regimes. Among the pioneers were the Amnesty Committees in Brazil, the International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) and the Secretariat for Amnesty and Democracy in Paraguay (SIJADEP). Amnesty, as a symbol of freedom, would prove to be a topic that could mobilize large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes.

Second stage

3. This stage occurred in the 1980s. Amnesty, the symbol of freedom, was more and more seen as a kind of "down-payment on impunity" with the emergence, then proliferation, of "self-amnesty" laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time. This provoked a strong reaction from victims, who built up their organizational capacity to ensure that "justice was done", as would be shown in Latin America by the increasing prominence of the Mothers of the Plaza de Mayo, followed by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM) which later fanned out onto other continents.

Third stage

4. With the end of the cold war symbolized by the fall of the Berlin Wall, this period was marked by many processes of democratization or return to democracy along with peace agreements putting an end to internal armed conflicts. Whether in the course of national dialogue or peace negotiations, the question of impunity constantly cropped up between parties seeking to strike an unattainable balance between the former oppressors' desire for everything to be forgotten and the victims' quest for justice.

Fourth stage

5. This was when the international community realized the importance of combating impunity. The Inter-American Court of Human Rights, for example, in a ground-breaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to

a fair hearing before an impartial and independent court. The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, entitled "Vienna Declaration and Programme of Action" (A/CONF.157/24, Part II, para. 91).

6. This report therefore comes under the general heading of the Vienna Programme of Action. It recommends adoption by the United Nations General Assembly of a set of principles for the protection and promotion of human rights through action to combat impunity.

B. Background of the study

7. The better to understand the final stage of the study, it must be shown how this report fits into the work of the Sub-Commission.

8. Thirty-eighth session (August 1985). Presentation by Mr. Joinet, in his capacity as Special Rapporteur on amnesty, of a final report entitled "Study on amnesty laws and their role in the safeguard and promotion of human rights" (E/CN.4/Sub.2/1985/16/Rev.1). The present report draws in part on chapter III of that study.

9. Forty-third session (August 1991). In its decision 1991/110, the Sub-Commission asked two of its members, Mr. El Hadji Guissé and Mr. Louis Joinet, to draft a working paper on the approaches that a study on impunity might take.

10. Forty-fourth session (August 1992). Following the submission of the working paper (E/CN.4/Sub.2/1992/18), the Sub-Commission decided, by its resolution 1992/23, to request the co-authors to draft a study on the impunity of perpetrators of violations of human rights. The Commission on Human Rights (in resolution 1993/43) and the Economic and Social Council (in decision 1993/266) approved this action.

11. Forty-fifth session (August 1993). Upon presentation of the preliminary report - and not the "progress" report as erroneously indicated (E/CN.4/Sub.2/1993/6) - the Sub-Commission requested the co-authors to extend their study to serious violations of economic, social and cultural rights.

12. Forty-sixth session (August 1994). After welcoming the preliminary report on the impunity of perpetrators of human rights violations (economic, social and cultural rights) (E/CN.4/Sub.2/1994/11 and Corr. 1), the Sub-Commission decided (resolution 1994/34) to split the study in two, entrusting Mr. Joinet with the aspect of civil and political rights and Mr. El Hadji Guissé with that of economic, social and cultural rights.

13. Forty-seventh session (August 1995). Through its resolution 1995/35, the Sub-Commission welcomed with satisfaction the progress report by Mr. Joinet (E/CN.4/Sub.2/1995/18), which contained a summary of comments on certain matters of principle, and requested him to submit his final report in August 1996, at its forty-eighth session.

14. Forty-eighth session (August 1996). Lacking the time to consider the report, the Sub-Commission requested the Special Rapporteur

(decision 1996/119) to submit to it at its forty-ninth session a final version, revised and extended, incorporating a revised version of the set of principles for the protection and promotion of human rights through action to combat impunity.

15. Forty-ninth session (August 1997). This final report is submitted to the Sub-Commission at its present session in accordance with the above-mentioned decision.

I. OVERALL PRESENTATION OF THE SET OF PRINCIPLES

16. The following three sections summarize the overall presentation of the set of principles and their justification in reference to victims' rights:

(a) The victims' right to know;

(b) The victims' right to justice; and

(c) The victims' right to reparations.

A. The right to know

17. This is not simply the right of any individual victim or his nearest and dearest to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember" on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.

18. Two series of measures are proposed for this purpose. The first is to establish - promptly in principle - extrajudicial commissions of inquiry, for - unless handing down summary justice, which has too often been the case over history - the courts cannot quickly punish executioners and those who give them their orders. The second is to preserve archives relating to human rights violations.

1. Extrajudicial commissions of inquiry

19. These have two main aims: first, to dismantle the machinery which has led to aberrant behaviour becoming almost administrative practice, in order to ensure it does not recur; second, to preserve evidence for the judiciary but also to establish that what oppressors often denounced as lies, in order to discredit human rights advocates, all too often fell short of the truth, and thus to give those advocates back their good name.

20. Experience shows that care must be taken not to allow these commissions to be sidetracked or furnish a pretext for not going before the courts. Hence the idea of suggesting basic principles, derived from a comparative analysis of past and present commissions' experience, which commissions must honour or lose credibility. These principles relate to four main areas, discussed below.

(a) Guaranteed independence and impartiality

21. The extrajudicial commissions of inquiry should be set up by law, by act of general application or by agreement in the context of a transitional arrangement or peace accord. Their members should not be subject to dismissal during their terms of office: they must be protected by immunity and, if necessary, be able to seek police assistance. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the justice system but at most to help to safeguard evidence. Commissions' credibility should also be backed up by adequate financial and personnel resources.

(b) Safeguards for witnesses and victims

22. Testimony should be taken from witnesses and victims only on a voluntary basis. As a safety precaution, anonymity may be permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a commission member must be empowered to examine the grounds for the request of anonymity and, confidentially, ascertain the witness's identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

(c) Guarantees for persons implicated

23. If the commission is permitted to divulge their names, the persons implicated must either have been given a hearing or at least summoned to do so, or must be able to exercise a right of reply in writing, the reply then being included in the file.

(d) Publicity for the commissions' reports

24. While there may be reasons to keep the commissions' proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicized as widely as possible. Commission members must enjoy immunity from prosecution for defamation.

2. Preserving archives relating to human rights violations

25. The right to know implies that archives must be preserved. The steps required for this purpose are:

(a) Protective measures and moves to punish the destruction or concealment of, or illicit traffic (black market) in, archives;

(b) Creation of an inventory of archives including, with the cooperation of the countries concerned, archives maintained by third countries;

(c) Adaptation of the regulations governing access to and consultation of archives to changed circumstances, among other things by allowing anyone they implicate to add a right of reply to the file.

B. The right to justice

1. The right to a fair and effective remedy

26. This implies that any victim can assert his rights and receive a fair and effective remedy, including seeing that his oppressor stands trial and obtaining reparations. There can be no just and lasting reconciliation without an effective response to the need for justice; as a factor in reconciliation, forgiveness, a private act, implies that the victim must know the perpetrator of the violations and that the latter has been able to show repentance. If forgiveness is to be granted, it must first have been sought.

27. The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is principally one for the State to take, supplementary procedural rules should allow any victim to become a civil party to the proceedings or, if the public authorities fail to do so, to institute proceedings himself.

28. On principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function. The tricky question of an international court then arises: should this be an ad hoc court, like those established to deal with the violations in the former Yugoslavia or Rwanda, or a standing international court such as is proposed in a document currently before the United Nations General Assembly? Whatever court is finally granted jurisdiction, its rules of procedure must satisfy the criteria of the right to a fair trial. One cannot try perpetrators of violations without oneself respecting human rights.

29. Lastly, international human rights treaties should include a "universal jurisdiction" clause requiring every State party either to try or to extradite perpetrators. Political will is still needed to enforce such clauses. It will be noted, for example, that those in the 1949 Geneva Conventions or the United Nations Convention Against Torture have scarcely ever been applied.

2. Restrictions justified by the desire to combat impunity

30. Restrictions may be applied to certain rules of law in order to support efforts to counter impunity. The aim is to prevent the rules concerned from being used to further impunity, thus obstructing the course of justice. These restrictions relate to the following.

(a) Prescription

31. Prescription cannot be invoked against serious crimes under international law such as crimes against humanity. It cannot run in respect

of any violation while no effective remedy is available. Similarly, prescription cannot be invoked against civil, administrative or disciplinary actions brought by victims.

(b) Amnesty

32. Amnesty cannot be accorded to perpetrators before the victims have obtained justice by means of an effective remedy.

(c) Right to asylum

33. No territorial or diplomatic asylum, or status of political refugee, can be accorded.

(d) Extradition

34. The political nature of the offence may not be advanced as an argument against extradition; nor can the principle of non-extradition of nationals.

(e) Trial in absentia

35. Unlike most Roman-law countries, the common-law countries' legal systems do not acknowledge trial in absentia. This gives a significant fillip to impunity, especially when the countries concerned refuse to cooperate with justice (for example, the International Criminal Tribunal in the Hague). As a compromise, trial in absentia might be countenanced once it has been legally established that cooperation was being refused. If not, the refusal to acknowledge trial in absentia should apply to the judgement phase alone.

(f) Due obedience

36. Due obedience cannot exonerate a perpetrator from criminal responsibility; at most it may be taken into consideration as a mitigating circumstance. Similarly, the fact that violations may have been perpetrated by a subordinate will not exonerate his superiors if they did not use their authority to prevent or halt the violation as soon as they knew - or were in a position to know - that a violation was being or was about to be committed.

(g) Legislation on repentance

37. Legislation on repentance may be advanced in mitigation of evidence but cannot completely exonerate perpetrators; a distinction must be drawn, depending on what risks the perpetrators ran, between revelations made while grave violations were taking place and those made afterwards.

(h) Military courts

38. Because military courts do not have enough statutory independence, their jurisdiction must be limited to specifically military infractions committed by members of the military, excluding serious crimes under international law which must come within the jurisdiction of the ordinary courts.

(i) The principle of the irremovability of judges

39. Irremovability, vital as a safeguard of the independence of the courts, must not become an impunity premium. Judges appointed in conformity with an earlier legal regime may be confirmed in their positions. Conversely, judges appointed unlawfully may be relieved of their functions in accordance with the principle of parallelism.

C. The right to reparation

40. The right to reparation entails both individual measures and general, collective measures.

1. Individual measures

41. Individually, victims - including relatives or dependants - must have an effective remedy. The procedures applicable must be publicized as widely as possible. The right to reparation should cover all injuries suffered by the victim. It embraces three kinds of action:

(a) Restitution (seeking to restore the victim to his previous situation);

(b) Compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal aid costs); and

(c) Rehabilitation (medical care, including psychological and psychiatric treatment).

2. General or collective measures

42. Collectively, symbolic measures - annual homage to the victims or public recognition by the State of its responsibility, for example - besides helping to restore victims' dignity, also help to discharge the duty of remembrance. In France, for example, it took more than 50 years for the Head of State formally to acknowledge, in 1996, the responsibility of the French State for the crimes against human rights committed by the Vichy regime between 1940 and 1944. Mention can be made of similar statements by President Cardoso concerning violations committed under the military dictatorship in Brazil. Above all, the initiative of the Spanish Government, which has just conferred the status of ex-servicemen on the anti-Fascists and International Brigade members who fought on the Republican side during the civil war, must be singled out.

3. Guarantees of non-repetition

43. As the same causes produce the same effects, three steps are necessary to prevent victims from having to face renewed encroachments on their dignity:

(a) Disbandment of parastatal armed groups: this is one of the hardest measures to enforce for, if not accompanied by action to reintegrate group members into society, the cure may be worse than the disease;

(b) Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus; and

(c) Removal from office of senior officials implicated in serious violations. These measures are of a preventive, not punitive, character and must be taken by administrative decision, giving the official the opportunity to seek effective remedy.

II. PROPOSALS AND RECOMMENDATIONS

44. Even before the United Nations began to take action in the campaign against impunity, non-governmental organizations, as has been seen, played a pioneering role and began to trace out a strategy for action. Among the many initiatives taken, those mentioned below have made a particular contribution to the Special Rapporteur's reflections:

(a) The "courts of opinion", in particular the Russell Tribunal, later the Standing People's Tribunal, which in the absence of an international tribunal - under study at the United Nations since 1946 - filled an institutional lacuna in the face of rampant impunity (see Louis Joinet, "Les tribunaux d'opinion", in Marxisme, démocratie et droit des peuples, Hommage à Lelio Basso, (Milan, Editions Franco Angelis, 1979) p. 821);

(b) The international meeting concerning impunity for perpetrators of gross human rights violations, held at the Palais des Nations, Geneva, by the International Commission of Jurists (ICJ) and the National Advisory Committee on Human Rights (CNCDH-France) from 2 to 5 November 1992 (the records of the meeting were published by ICJ under the title Non à l'impunité, oui à la justice, Geneva, 1993);

(c) The report by Mr. Theo van Boven on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8);

(d) The international seminar on impunity and its effects on democratization processes, held in Santiago, Chile, from 13 to 15 December 1996 by the Chilean non-governmental organizations Committee for the Defence of the People's Rights (CODEPU), Social Assistance Foundation of the Christian Churches (FASIC), and Service, Peace and Justice in Latin America - Chile (SERPAJ).

45. These efforts have shown that non-governmental organizations are increasingly aware of the need to back up their campaign with reference to standards drawn from experience and recognized by the international community. This is one of the reasons why the Special Rapporteur proposes adoption of the set of principles for the protection and promotion of human rights through action to combat impunity. But the set of principles is also intended to benefit both the - too few - States showing the political will to tackle impunity and the partners in national "dialogues" or "peace negotiations", who will all have to face this problem.

46. It is against this background and in this spirit that the Special Rapporteur recommends that the Commission on Human Rights and the Economic and

Social Council should propose to the General Assembly adoption of the set of principles as a broad strategic framework for the campaign against impunity, but also, in a more technical light, as an aid to those negotiating peace agreements, and the politicians supervising them, in reaching a decision.

47. Annexed to this final, revised and expanded report is the revised text of the set of principles as requested by the Sub-Commission in its decision 1996/119. Annex I gives a synoptical table of the set of principles, and the full text appears in annex II.

CONCLUSION

48. In concluding, the Special Rapporteur would like to draw attention to a number of particularly alarming situations for which he must admit he has no solutions to propose, though such situations - albeit largely for technical reasons - help to perpetuate impunity. How is it possible to combat impunity and ensure a victim's right to justice when the number of people imprisoned on suspicion of serious human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time? Mention can be made of the case of Rwanda where, according to the Special Rapporteur, Mr. René Degni-Segui (E/CN.4/1997/61, para. 69), over 90,000 people, most of them facing charges of genocide, are in prison while the justice system, which has been much disrupted by events, cannot yet deal with the situation effectively enough. It is also vain to imagine that an international criminal tribunal offers a solution. Such courts by their nature can try only a small number of people annually, - whence the importance in conducting prosecutions of setting priorities and trying first, wherever possible, those perpetrators of crimes under international law who are at the top of the hierarchy.

AFTERWORD

49. To those who might be tempted to regard the set of principles proposed here as an obstacle to national reconciliation, I would answer this: these principles are not legal standards in the strict sense, but guiding principles intended not to thwart reconciliation but to avoid distortions in policies so that, once beyond the first stage, which is more "conciliation" than reconciliation, the foundations of a "just and lasting reconciliation" may be laid.

50. Before turning over a new leaf one must have read the old one. But the campaign against impunity is not just a legal and political issue: its ethical dimension is all too often forgotten.

51. "From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity." This sentiment, which opened the preliminary report submitted to the Sub-Commission in 1993 (E/CN.4/Sub.2/1993/6), is still valid, and makes an appropriate afterword.

Annex I

SYNOPTICAL TABLE OF THE SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

PREAMBLE

DEFINITIONS

"Impunity", "serious crimes under international law"

I. THE RIGHT TO KNOW

A. General principles

Principle 1: The inalienable right to the truth

Principle 2: The duty to remember

Principle 3: The victims' right to know

Principle 4: Guarantees to give effect to the right to know

B. Extrajudicial commissions of inquiry

Principle 5: Role of the extrajudicial commissions of inquiry

Principle 6: Guarantees of independence and impartiality

Principle 7: Definition of the commissions' terms of reference

Principle 8: Guarantees for persons implicated

Principle 9: Guarantees for witnesses and victims

Principle 10: Operation of the commissions

Principle 11: Advisory functions of the commissions

Principle 12: Publicizing the reports of the commissions

C. Preservation of and access to archives

Principle 13: Measures for the preservation of archives

Principle 14: Administration of archive centres

Principle 15: Administrative measures relating to archive inventories

Principle 16: Measures to facilitate access to archives

Principle 17: Cooperation between archive departments and the courts and extrajudicial commissions of inquiry

Principle 18: Specific measures relating to archives containing names

II. RIGHT TO JUSTICE

A. General principles

Principle 19: Safeguards against the use of reconciliation or forgiveness to further impunity

Principle 20: Duties of States with regard to the administration of justice

B. Distribution of jurisdiction between national, foreign and international courts

Principle 21 Jurisdiction of international criminal courts

Principle 22: Rules of procedure applicable in international courts

Principle 23: Jurisdiction of foreign courts

Principle 24: Measures to strengthen the effectiveness of treaty provisions on universal jurisdiction

Principle 25: Measures to determine extraterritorial jurisdiction in internal law

C. Restrictive measures justified by action to combat impunity

Principle 26: Scope of restrictive measures

Principle 27: Restrictions relating to prescription

Principle 28: Restrictions on the practice of amnesty

Principle 29: Restrictions on the right of asylum

Principle 30: Restrictions on extradition

Principle 31: Restrictions on the exclusion of *in absentia* procedure

Principle 32: Restrictions on the principle of due obedience

Principle 33: Restrictions on the effects of legislation on repentance

Principle 34: Restrictions on the jurisdiction of military courts

Principle 35: Restrictions on the principle of the irremovability of judges

III. RIGHT TO REPARATION

A. General principles

Principle 36: Rights and duties arising out of the obligation to make reparation

Principle 37: Reparation procedures

Principle 38: Publicizing reparation procedures

Principle 39: Scope of the right to reparation

B. Individual measures of reparation

Principle 40: Measures of restitution

Principle 41: Measures of compensation

Principle 42: Measures of rehabilitation

Principle 43: Special measures in cases of forced disappearance

C. General or collective measures of reparation

Principle 44: Measures of satisfaction

D. Guarantees of non-repetition

Principle 45: Areas affected by guarantees of non-repetition

Principle 46: Disbandment of unofficial armed groups directly or indirectly linked to the State and of private groups benefiting from its passivity

Principle 47: Repeal of emergency legislation and abolition of emergency courts

Principle 48: Administrative and other measures relating to State officials implicated in serious human rights violations

Principle 49: Implementation of administrative measures

Principle 50: Nature of measures that can be taken against State officials

Annex II

SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

PREAMBLE

The General Assembly,

Recalling the Preamble of the Universal Declaration of Human Rights, which states that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,

Aware that there is always a risk that such acts may occur,

Reaffirming the commitment made by the Member States under Article 56 of the Charter of the United Nations to take joint and separate action, giving full importance to developing effective international cooperation for the achievement of the purposes set forth in Article 55 of the Charter concerning universal respect for, and observance of, human rights and fundamental freedoms for all,

Considering that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity,

Recalling the recommendation contained in paragraph 91 of Part II of the Vienna Declaration and Programme of Action, wherein the World Conference on Human Rights (June 1993) expressed its concern about the impunity of perpetrators of human rights violations and encouraged the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue,

Convinced, therefore, that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity,

Decides, pursuant to the aforesaid recommendation of the Vienna Declaration and Programme of Action, solemnly to proclaim the following principles for the guidance of States having to combat impunity.

DEFINITIONS

A. Impunity

"Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject

to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.

B. Serious crimes under international law

This term, as used in these principles, covers war crimes, crimes against humanity, including genocide, and grave breaches of and crimes against international humanitarian law.

I. THE RIGHT TO KNOW

A. General principles

PRINCIPLE 1. THE INALIENABLE RIGHT TO THE TRUTH

Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.

PRINCIPLE 2. THE DUTY TO REMEMBER

A people's knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

PRINCIPLE 3. THE VICTIMS' RIGHT TO KNOW

Irrespective of any legal proceedings, victims, their families and dear ones have the right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.

PRINCIPLE 4. GUARANTEES TO GIVE EFFECT TO THE RIGHT TO KNOW

To give effect to the right to know, States must take appropriate action. Failing judicial institutions, priority should initially be given to establishing extrajudicial commissions of inquiry and ensuring the preservation of, and access to, the archives concerned.

B. Extrajudicial Commissions of Inquiry

PRINCIPLE 5. ROLE OF THE EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The Extrajudicial Commissions of Inquiry shall have the task of establishing the facts so that the truth can be found, and of preventing evidence from disappearing. In order to restore the dignity of the victims, families and human rights defenders, these investigations shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.

PRINCIPLE 6. GUARANTEES OF INDEPENDENCE AND IMPARTIALITY

In order to found their legitimacy upon incontestable guarantees of independence and impartiality, the terms of reference of the Commissions must respect the following principles: Commissions

(a) Shall be established by law or, depending on the circumstances, by a contractual instrument or treaty clause concluding a process of national dialogue or a peace accord;

(b) Shall be constituted in accordance with criteria making clear to the public the impartiality of their members and on conditions ensuring their independence, in particular by the irremovability of their members for the duration of their terms of office, guaranteed immunities and privileges essential to their safety, including after their mission is over, and the power to require assistance from the public authorities if necessary.

PRINCIPLE 7. DEFINITION OF THE COMMISSIONS' TERMS OF REFERENCE

To avoid conflicts of jurisdiction, the terms of reference of the Commissions must be set forth clearly. They shall incorporate at least the following stipulations and limitations:

(a) The Commissions are not intended to act as substitutes for the civil, administrative or criminal courts, which shall alone have jurisdiction to establish individual criminal or other responsibility with a view to reaching a decision as to guilt and, where appropriate, passing sentence;

(b) Their investigations shall relate to all persons cited in allegations of human rights violations, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups with any kind of link to the State, or of non-governmental armed movements having the status of belligerents. If the circumstances so warrant, they may also extend to serious crimes allegedly committed by any other organized, armed group;

(c) The Commissions shall have jurisdiction to consider all forms of human rights violations. Their investigations shall focus as a matter of priority on those violations appearing to constitute a consistent pattern of gross violations. They shall endeavour:

(i) To analyse and describe the machinery of the State through which the violating system operated, and to identify the victims and the administrations, agencies and private entities involved and reconstruct their roles;

(ii) To safeguard evidence for later use in the administration of justice;

(iii) To recommend ways of diminishing the effects of impunity.

PRINCIPLE 8. GUARANTEES FOR PERSONS IMPLICATED

Any persons implicated when the facts are established shall be entitled, especially if the Commission is permitted under its terms of reference to divulge their names, to the following guarantees based on the adversarial principle:

(a) The Commission must strive to corroborate information gathered by other sources;

(b) The person implicated shall have the opportunity to make a statement setting out his or her version of the facts or, within the time prescribed by the instrument establishing the Commission, to submit a document equivalent to a right of reply for inclusion in the file. The rules of evidence provided for in principle 18 (c) shall apply.

PRINCIPLE 9. GUARANTEES FOR WITNESSES AND VICTIMS

Steps shall be taken to guarantee the security and protection of witnesses and victims.

(a) They may be called upon to testify before the Commission only on a strictly voluntary basis;

(b) If anonymity is deemed necessary in their interests, it may be allowed only on three conditions, namely:

(i) That it is an exceptional measure, except in the case of victims of sexual abuse;

(ii) That the Chairman and one member of the Commission are empowered to satisfy themselves that the application is warranted and ascertain, in confidence, the identity of the witness so as to be able to give assurances to the other members of the Commission;

(iii) That the report will normally refer to the gist of the testimony if it is accepted by the Commission.

PRINCIPLE 10. OPERATION OF THE COMMISSIONS

The Commissions shall be provided with:

(a) Transparent funding to prevent them from coming under suspicion;

(b) Sufficient material and human resources for their credibility not to be open to question.

PRINCIPLE 11. ADVISORY FUNCTIONS OF THE COMMISSIONS

The Commissions' terms of reference shall include provisions calling for them to make recommendations on action to combat impunity in their final reports.

These recommendations shall contain proposals aimed, inter alia, on the basis of the facts and of any responsibility that has been established, at encouraging the perpetrators of the violations to admit their guilt.

The recommendations shall, in addition, set out legislative or other measures to put these principles into effect and to prevent any further violations. These measures shall primarily concern the army, police and justice system and the strengthening of democratic institutions.

PRINCIPLE 12. PUBLICIZING THE REPORT OF THE COMMISSIONS

For security reasons or in order to avoid pressure on witnesses and Commission members, the Commissions' terms of reference may stipulate that the inquiry shall be kept confidential. The complete final report, on the other hand, should always be made public and be disseminated as widely as possible.

Commission members shall be protected by immunity from any defamation or other civil or criminal proceedings that might be brought against them in connection with material contained in the report.

C. Preservation of and access to archives

PRINCIPLE 13. MEASURES FOR THE PRESERVATION OF ARCHIVES

The right to know means that archives should be preserved. Technical measures of a protective nature shall be taken to prevent the removal, destruction, concealment or falsification of archives containing evidence of violations.

These urgent measures shall be followed by legislative or other reforms permanently governing the storage and preservation of and access to the archives in accordance with the principles set out below; specific measures shall be taken in the case of archives containing names in accordance with principle 18. Third countries in possession of such archives are invited to cooperate in their restitution.

Severe penalties shall be laid down for misappropriation of archives, especially with a view to negotiating payment for them.

PRINCIPLE 14. ADMINISTRATION OF ARCHIVE CENTRES

Measures shall be taken to place each archive centre under the responsibility of a specifically designated person. If that person was already in charge of the archive centre during the reference period, he or she must be explicitly redesignated, subject to the modalities stipulated in principles 49 and 50.

PRINCIPLE 15. ADMINISTRATIVE MEASURES RELATING TO ARCHIVE INVENTORIES

Priority shall initially be given to drawing up inventories of the archives stored including, with their cooperation, those held in

third countries, and ascertaining the reliability of existing inventories. Special attention shall be given to archives of places of detention, in particular when such places did not exist officially.

PRINCIPLE 16. MEASURES TO FACILITATE ACCESS TO ARCHIVES

Access to archives shall be facilitated, in the interest of historical research in particular. Authorization formalities shall normally have the sole purpose of controlling access and may not be used for purposes of censorship.

PRINCIPLE 17. COOPERATION BETWEEN ARCHIVE DEPARTMENTS AND THE COURTS AND EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The courts and extrajudicial commissions of inquiry, as well as the investigators reporting to them, shall have free access to archives. Considerations of national security may not be invoked to prevent access. In accordance with their sovereign powers of assessment, however, the courts and extrajudicial commissions of inquiry may decide, in exceptional circumstances, not to make certain information public if it might jeopardize the restoration of the rule of law.

PRINCIPLE 18. SPECIFIC MEASURES RELATING TO ARCHIVES CONTAINING NAMES

(a) For the purposes of this principle, archives containing names shall be understood to be those archives containing information that make it possible, in any way whatsoever, directly or indirectly, to identify the individuals to whom they relate, regardless of whether such archives are on paper or in computer files.

(b) Everyone shall be entitled to know whether his or her name appears in the archives and, if it does, to exercise his or her right of access and challenge the validity of the information concerning him or her by exercising a right of reply. The document containing his or her own version shall be attached to the document challenged.

(c) Except where it relates to service officials or persons working with them on an ongoing basis, information in information service archives containing names shall not by itself constitute incriminating evidence, unless it is corroborated by several other reliable sources.

II. RIGHT TO JUSTICE

A. General principles

PRINCIPLE 19. SAFEGUARDS AGAINST THE USE OF RECONCILIATION OR FORGIVENESS TO FURTHER IMPUNITY

There can be no just and lasting reconciliation without an effective response to the need for justice; an important element in reconciliation is forgiveness, a private act which implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance.

PRINCIPLE 20. DUTIES OF STATES WITH REGARD TO THE ADMINISTRATION OF JUSTICE

Impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished, to provide the victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.

Although the decision to prosecute is primarily within the competence of the State, supplementary procedural rules should be set forth to enable any victim to institute proceedings on his or her own behalf where the authorities fail to do so, or to become an associated party. This option shall be extended to non-governmental organizations able to show proof of long-standing activities for the protection of the victims concerned.

B. Distribution of jurisdiction between national, foreign and international courts

PRINCIPLE 21. JURISDICTION OF INTERNATIONAL CRIMINAL COURTS

To avoid the need to apply to ad hoc international criminal courts, a standing international criminal court must be set up with jurisdiction binding on all Member States.

It shall remain the rule that national courts normally have jurisdiction, particularly when the offence as defined in domestic law does not fall within the terms of reference of the international court. International criminal courts shall have concurrent jurisdiction where national courts cannot yet offer satisfactory guarantees of independence and impartiality, or are physically unable to function.

To this purpose the international criminal court may at any point in the proceedings require the national court to relinquish a case to it.

PRINCIPLE 22. RULES OF PROCEDURE APPLICABLE IN INTERNATIONAL COURTS

The rules of procedure applicable in international courts shall conform to the provisions of articles 8 to 11 of the Universal Declaration of Human Rights and 9, 14 and 15 of the International Covenant on Civil and Political Rights with regard to the right to a fair hearing.

PRINCIPLE 23. JURISDICTION OF FOREIGN COURTS

The subsidiary jurisdiction of foreign courts shall be exercised by virtue either of a provision on universal jurisdiction set forth in a treaty in force or of a provision of internal law establishing a rule of extraterritorial jurisdiction for serious crimes under international law.

PRINCIPLE 24. MEASURES TO STRENGTHEN THE EFFECTIVENESS OF TREATY PROVISIONS ON UNIVERSAL JURISDICTION

(a) A provision on universal jurisdiction applicable to serious crimes under international law should be included in all international human rights instruments dealing with such crimes.

(b) By ratifying such instruments, States will pledge, pursuant to such a provision, to seek and prosecute persons against whom there are specific, consistent allegations of involvement in a serious crime under international law, with a view to trying or extraditing them. They are consequently bound to take legislative or other measures under internal law to ensure the implementation of the provision on universal jurisdiction.

PRINCIPLE 25. MEASURES TO DETERMINE EXTRATERRITORIAL JURISDICTION IN INTERNAL LAW

In the absence of a ratification making it possible to apply a universal jurisdiction clause to the country where the crime was committed, States may for efficiency's sake take measures in their internal legislation to establish extraterritorial jurisdiction over serious crimes under international law committed outside their territory which by their nature are within the purview not only of internal criminal law but also of an international punitive system to which the concept of frontiers is alien.

C. Restrictive measures justified by action to combat impunity

PRINCIPLE 26. SCOPE OF RESTRICTIVE MEASURES

Safeguards must be established against the misuse to further impunity of prescription, amnesty, right to asylum, refusal to extradite, absence of in absentia procedure, due obedience, legislation on repentance, the jurisdiction of military courts and the irremovability of judges.

PRINCIPLE 27: RESTRICTIONS ON PRESCRIPTION

Prescription - of prosecution or penalty - in criminal cases shall not run while no effective remedies are in existence.

Prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible.

When it does apply, prescription shall not be invoked against civil or administrative actions brought by victims seeking reparation for their injuries.

PRINCIPLE 28. RESTRICTIONS ON THE PRACTICE OF AMNESTY

When amnesty is intended to establish conditions conducive to a peace agreement or to foster national reconciliation, it shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law and the perpetrators of gross and systematic violations may not be included in the amnesty unless the victims have been unable to avail themselves of an effective remedy and obtain a fair and effective decision;

(b) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have done nothing but exercise this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;

(c) Any individual convicted of offences other than those laid down in paragraph (b) of this principle who comes within the scope of the amnesty is free to refuse it and request a retrial if he has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights or if he has been subjected to inhuman or degrading interrogation, especially under torture.

PRINCIPLE 29. RESTRICTIONS ON THE RIGHT OF ASYLUM

Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.

PRINCIPLE 30. RESTRICTIONS ON EXTRADITION

Persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country.

PRINCIPLE 31. RESTRICTIONS ON THE EXCLUSION OF <u>IN ABSENTIA</u> PROCEDURE

Except for establishing a guarantee of impunity, non-recognition of <u>in absentia</u> procedure by a legal system should be limited to the sentencing stage to enable the necessary investigations, including the hearing of witnesses and victims, to be carried out and charges to be preferred, followed by wanted notices and arrest warrants, if necessary international, executed according to the procedures laid down in the Constitution of the International Criminal Police Organization (ICPO) - Interpol.

PRINCIPLE 32. RESTRICTIONS ON THE PRINCIPLE OF DUE OBEDIENCE

(a) The fact that the perpetrator of violations acted on the orders of his Government or of a superior does not exempt him from criminal or other responsibility but may be regarded as grounds for reducing the sentence if justice permits.

(b) The fact that violations have been committed by a subordinate does not exempt his superiors from criminal or other responsibility if they knew or had at the time reason to believe that the subordinate was committing or about to commit such a crime and they did not take all action within their power to prevent or stop him. The official status of a perpetrator of a crime under international law - even a head of State or government - does not exempt him or her from criminal responsibility and is not grounds for a reduction of sentence.

PRINCIPLE 33. RESTRICTIONS ON THE EFFECTS OF LEGISLATION ON REPENTANCE

The fact that, once the period of persecution is over, a perpetrator discloses the violations that he or others have committed in order to benefit from the favourable provisions of legislation on repentance cannot exempt him from criminal or other responsibility. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.

Disclosures made during the period of persecution may attract a reduction extending as far as absolute discharge in view of the risks the perpetrator ran at the time. In that case, principle 30 notwithstanding, the perpetrator may be granted asylum - not refugee status - in order to facilitate revelation of the truth.

PRINCIPLE 34. RESTRICTIONS ON THE JURISDICTION OF MILITARY COURTS

In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to specifically military offences committed by military personnel, excluding human rights violations constituting serious crimes under international law, which come under the jurisdiction of the ordinary domestic courts or, where necessary, an international court.

PRINCIPLE 35. RESTRICTIONS ON THE PRINCIPLE OF THE IRREMOVABILITY OF JUDGES

The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in accordance with a procedure consistent with a constitutional State. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions in accordance with the principle of parallelism. They may ask to be afforded the guarantees laid down in principles 49 and 50, in particular with a view to seeking reinstatement, where applicable.

III. RIGHT TO REPARATION

A. General principles

PRINCIPLE 36. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION

Any human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator.

PRINCIPLE 37. REPARATION PROCEDURES

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings covered by the restrictions on prescription set out in principle 29. Their exercise of this right shall afford them protection against intimidation and reprisals. Exercise of the right to reparation includes access to the applicable international procedures.

PRINCIPLE 38. PUBLICIZING REPARATION PROCEDURES

Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private, as well as public, communications media. This dissemination should take place both within and outside the country, through, among other channels, consular departments particularly in countries to which large numbers of victims have been forced into exile.

PRINCIPLE 39. SCOPE OF THE RIGHT TO REPARATION

The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, and general reparation measures such as measures of satisfaction and guarantees of non-repetition.

B. Individual measures of reparation

PRINCIPLE 40. MEASURES OF RESTITUTION

Restitution, the purpose of which shall be to seek to restore the victim to his or her former circumstances, entails restoring, inter alia, the exercise of individual freedoms and the right to citizenship, to family life, to return to one's country, to employment and to property ownership.

PRINCIPLE 41. MEASURES OF COMPENSATION

Compensation must equal the financially assessable value of all damage suffered, particularly:

(a) Physical or mental injury, including pain, suffering and emotional shocks;

(b) The loss of an opportunity, including educational opportunities;

(c) Material damage and loss of income, including loss of earnings;

(d) Attacks on reputation or dignity;

(e) Costs of legal assistance and valuations.

The right to compensation may be exercised collectively, on behalf of groups of victims, under bilateral or multilateral agreements following an armed conflict.

PRINCIPLE 42. MEASURES OF REHABILITATION

Measures of rehabilitation shall include coverage of the costs of medical, psychological or psychiatric care, as well as social, legal and other services.

PRINCIPLE 43. SPECIAL MEASURES IN CASE OF FORCED DISAPPEARANCE

When the fate of a disappeared person is elucidated, the victim's family must be notified so that, should the victim have died, the body can be reclaimed after identification whether or not the perpetrators have been identified, prosecuted or tried.

C. General or collective measures of reparation

PRINCIPLE 44. MEASURES OF SATISFACTION

Symbolic measures shall be taken in the following areas as moral and collective reparation and to satisfy the duty to remember:

(a) Public recognition by the State of its responsibility;

(b) Official declarations rehabilitating victims;

(c) Commemorative ceremonies, naming of public thoroughfares, monuments, etc.;

(d) Periodic tribute to the victims;

(e) Acknowledgement in history textbooks and human rights training manuals of a faithful account of exceptionally serious violations.

D. Guarantees of non-repetition

PRINCIPLE 45. AREAS AFFECTED BY GUARANTEES OF NON-REPETITION

The State shall take appropriate measures to ensure that the victims cannot again be confronted with violations which undermine their dignity. Priority consideration shall be given to:

(a) Measures to disband parastatal armed groups;

(b) Measures repealing emergency provisions, legislative or otherwise, which have been conducive to violations;

(c) Administrative or other measures vis-à-vis State officials implicated in serious human rights violations.

PRINCIPLE 46. DISBANDMENT OF UNOFFICIAL ARMED GROUPS DIRECTLY OR INDIRECTLY LINKED TO THE STATE AND OF PRIVATE GROUPS BENEFITING FROM ITS PASSIVITY

In order to ensure the effective disbandment of such groups, the measures to be taken shall be first and foremost in the following areas:

(a) Reconstruction of organizational structure by identifying operatives so as to reveal their position, if any, in the administration, particularly in the army and the police, and by determining the covert links which they maintained with their active or passive partners, particularly in the information and security services or in pressure groups. The information thus acquired shall be made public;

(b) Thorough investigation of the information and security services with a view to redefining their functions;

(c) Securing the cooperation of third countries which might have contributed to the creation and development of such groups, particularly by providing financial or logistical support;

(d) Drawing up a recycling plan to ensure that members of such groups are not tempted to join the ranks of organized crime.

PRINCIPLE 47. REPEAL OF EMERGENCY LEGISLATION AND COURTS

Emergency legislation and courts of any type adopted or set up during the period of repression must be repealed or abolished insofar as they infringe the fundamental rights and freedoms guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Habeas corpus, whatever name it may be known by, must be considered a fundamental right of the individual and as such a non-derogable right.

PRINCIPLE 48. ADMINISTRATIVE AND OTHER MEASURES VIS-A-VIS STATE OFFICIALS IMPLICATED IN SERIOUS HUMAN RIGHTS VIOLATIONS

These measures are of a preventive, not punitive character; they may therefore be taken by administrative decision, provided that the implementation procedures are provided for by legislation, or by a contractual agreement concluding a process of national dialogue or a peace accord, as the case may be.

They are intended to avoid any administrative obstacle or challenge to the process of restoring, or the transition to, peace and/or democracy.

They are therefore quite distinct from the punitive and judicial measures provided for in principles 19 et seq. to be applied by the courts to persons prosecuted and tried for human rights violations.

PRINCIPLE 49. IMPLEMENTATION OF ADMINISTRATIVE MEASURES

Implementation of administrative measures should be preceded by an inventory of positions of responsibility with important decision-making power and therefore an obligation of loyalty to the process in progress. In the inventory, priority should be given to positions of responsibility in the army, the police and the judiciary.

In assessing the situation of each serving official, consideration will be given to:

(a) His human-rights record, particularly during the period of repression;

(b) Non-involvement in corruption;

(c) Professional competence;

(d) Skill in promoting the peace and/or democratization process, particularly with regard to the observance of constitutional guarantees and human rights.

Decisions shall be made by the head of Government or, under his responsibility, by the minister under whom the official works after the official concerned has been informed of the complaints against him and has been given a due hearing or summonsed for this purpose.

The official may appeal to the appropriate administrative court.

However, in view of the special circumstances inherent in any transition period, the appeal may be heard by an ad hoc commission with exclusive jurisdiction, provided that it meets the criteria of independence, impartiality and procedure laid down in principles 6, 7 (a), 8 (a) and (b) and 10.

PRINCIPLE 50. NATURE OF MEASURES THAT CAN BE TAKEN AGAINST STATE OFFICIALS

Except where he has been confirmed in his position, the official concerned may be:

(a) Suspended pending his confirmation or appointment to another post;

(b) Transferred;

(c) Demoted;

(d) Offered early retirement;

(e) Dismissed.

In the case of judges, the decision shall be taken in the light of the relevant provisions of principle 35.